Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

MICHAEL SKAKEL,

Petitioner,

v.

STATE OF CONNECTICUT,

Respondent.

On Petition for a Writ Of Certiorari to the Supreme Court of Connecticut

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Stogner v. California*, 539 U.S. 607 (2003), this Court held that a state law authorizing a prosecution that the passage of time had previously barred violates the Constitution's Ex Post Facto Clause. This Court's cases have held that the Due Process Clause prevents the judicial branch from achieving, through a legal interpretation both unexpected and indefensible by reference to the law previously expressed, that which the legislative branch may not achieve under the Ex Post Facto Clause. *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964); *Rogers v. Tennessee*, 532 U.S. 451, 461 (2001). In order to authorize a prosecution of petitioner, the Connecticut Supreme Court needed to overrule two of its prior unanimous decisions under which the limitations period had expired almost 20 years before the case was brought.

The question presented is whether a State violates the Due Process Clause of the Fourteenth Amendment when its highest court unexpectedly overrules its own binding interpretation of one of its statutes in order to authorize a criminal prosecution that the passage of time had previously barred.

PARTIES TO THE PROCEEDINGS

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Skakel respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of Connecticut in this case.

OPINIONS AND ORDERS BELOW

The opinion of the Supreme Court of Connecticut affirming petitioner's conviction is reported at 888 A.2d 985. Pet. App. 1a. The court's order denying petitioner's motion for reconsideration, to reargue and for reconsideration and reargument en banc is unreported. Pet. App. 158a.

JURISDICTION

The Supreme Court of Connecticut entered its judgment on January 24, 2006. It then denied petitioner's timely motion for reconsideration, to reargue and for reconsideration and reargument en banc on March 14, 2006. On May 25, 2006, Justice Ginsburg extended the time to file a petition for writ of certiorari to and including July 12, 2006. *See* Application No. 05A1084. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV, § 1.

Article I of the Constitution provides, in relevant part: "No State shall . . . pass any . . . ex post facto Law[.]" U.S. Const. art. I, § 10.

Conn. Gen. Stat. § 54-193 (Rev. to 1975) provided at the time of the offense: "No person shall be prosecuted for treason against this state, or for any crime or misdemeanor of which the punishment is or may be imprisonment in the Connecticut Correctional Institution, Somers, except within five years next after the offense has been committed; nor shall any person be prosecuted for the violation of any penal

law, or for other crime or misdemeanor, except crimes punishable by death or imprisonment in the Connecticut Correctional Institution, Somers, but within one year next after the offense has been committed . . . ."

Conn. Gen. Stat. § 54-193, as amended in April 1976, provided: "No person shall be prosecuted for any offense, except a capital felony or a class A felony for which the punishment is or may be imprisonment in excess of one year, except within five years next after the offense has been committed; nor shall any person be prosecuted for any other offense, except a capital felony or a class A felony, but within one year next after the offense has been committed . . . . There shall be no limitation of time within which a person may be prosecuted for a capital felony or a class A felony."

Conn. Gen. Stat. § 53a-54a (Rev. to 1975) provided in relevant part: "(c) Murder is punishable as a class A felony unless it is a capital felony and the death penalty is imposed as provided by section 53a-46a."

The relevant statutory provisions are reproduced in full at Pet. App. 162a.

STATEMENT OF THE CASE

This case presents a due process issue of exceptional importance implicating the right of every citizen to receive fair warning of when a prosecution may be brought. The Connecticut Supreme Court authorized a criminal prosecution of petitioner that the passage of time had previously barred. It did so by applying to his case a state statute that eliminates limitations periods for certain offenses, after having ruled twice in the previous 23 years that the statute does *not* apply to offenses, such as the one here, that pre-dated its enactment.

The offense of which petitioner was convicted—non-capital murder—occurred in 1975. At that time, the limitations period for such offenses was five years. In 1976, one year *later*, the Connecticut legislature enacted a statute elimi-

nating the limitations period for certain offenses, including non-capital murder. Between 1980 and petitioner's arrest in 2000, the Connecticut Supreme Court twice held, each time *unanimously*, that the 1976 statute did not apply to *pre-enactment* conduct. But in this case, the court announced that it had changed its view on how to interpret the scope of the 1976 statute; it overruled the two prior decisions that had declared the statute operates prospectively only; and it applied the new interpretation retroactively to petitioner.

By applying that new unexpected interpretation retroactively, and reviving a prosecution that had been barred for the previous 25 years, the court violated petitioner's right to due process of law. This issue is of exceptional importance; if the Connecticut Supreme Court's decision is correct then no one may safely look to a judicial interpretation of a criminal statute for fair warning as to the meaning and scope of that statute, no matter how authoritative and definitive the ruling appears to be. Such a result strikes at the foundation of every person's right to due process under the law; it is contrary to the decisions of this Court; and it conflicts with multiple decisions from the federal courts of appeals and state courts of last resort.

1. Petitioner was arrested on January 19, 2000 for a crime that occurred nearly 25 years earlier, when he was 15 years old. Following his arrest he was charged with non-capital murder under Connecticut General Statutes 53a-54a, and his case was transferred from juvenile to adult court. At the time of the conduct of which petitioner was accused, Connecticut had a five-year limitations period for all felony offenses. Conn. Gen. Stat. § 54-193 (Rev. to 1975) ("No person shall be prosecuted . . . for any crime or misdemeanor of which the punishment is or may be imprisonment in the Connecticut Correctional Institution, Somers, except within five years next after the offense has been committed").

Before trial, petitioner moved for dismissal on the ground that the five-year limitations period had expired in October 1980, more than 19 years before he was arrested.

His position was amply supported by two unanimous Connecticut Supreme Court decisions. The first, *State v. Paradise*, 456 A.2d 305, 306 (Conn. 1983), dismissed charges brought under the same murder statute, Conn. Gen. Stat. § 53a-54a (Rev. to 1975), because the action had not commenced until nearly eight years after the victim's death. The state's highest court first explained that because Section 53a-54a is a class A felony, 456 A.2d at 306, the limitations period under the statute in effect at the time of the offense—Conn. Gen. Stat. § 54-193 (Rev. to 1975)—was five years. 456 A.2d at 306-07. It then rejected the State's effort to take advantage of a new statute, enacted in April 1976, that eliminated the limitations period for capital and class A felonies. The court held that this newly expanded statute of limitations, "by its terms," did *not* apply to offenses pre-dating its enactment. *Id.* at 306 & 307. It therefore upheld dismissal of the charges on the ground that they were time-barred. Nine years later, the Connecticut Supreme Court reconsidered and unanimously reaffirmed its *Paradise* ruling in *State v. Crowell*, 636 A.2d 804 (Conn. 1994).

Despite those binding authorities holding that Section 54-193 "provided for a five-year period of limitations on *all* felony offenses," *Paradise*, 456 A.2d at 307 (emphasis added), the trial court concluded that the five-year period was inapplicable to the felony offense of non-capital murder. Pet. App. 28a. Under the trial court's reasoning, there had never been a limitations period for non-capital murder, even before the 1976 statute was enacted, and the *Paradise* interpretation of that statute had been wholly unnecessary. The case therefore proceeded to trial.

2. The evidence at petitioner's trial showed that on the night of October 30, 1975, 15-year-old Martha Moxley was bludgeoned to death near her family home in Greenwich, Connecticut. Her body was found at noon the next day. No physical evidence implicated petitioner in the murder. Instead, the State based its case on circumstantial evidence, presented largely through the testimony of persons who attempted to recall events that occurred more than a quarter

century earlier as well as those who recounted various statements allegedly made by petitioner, many of which were first mentioned to the authorities after the five-year limitations period had expired.

a. The State's medical examiner testified that the victim was killed with a golf club from a set that, according to witnesses, had belonged to petitioner's deceased mother, Pet. App. 5a-7a, and that the victim was likely attacked at the far end of her driveway and then dragged by her assailant to the location where she was later found—under a tree on a different part of her family's property. *Id.* The coroner found no traces of semen on the victim's body, Pet. App. 5a, and no blood or other forensic evidence linked petitioner to the crime.

In the absence of physical evidence connecting petitioner to the murder,[1] the prosecution built its case on a foundation of motive. According to the prosecution, petitioner had developed a romantic interest in the victim and became jealous upon observing her flirtations with petitioner's older brother, Tom Skakel, on the evening of the murder. Pet. App. 204a-206a, 233a.

b. Petitioner presented an alibi, but his ability to substantiate it at trial was seriously eroded by the prosecutorial delay. Moxley was last seen alive between 9:00 and 9:30 p.m. on October 30, standing in the driveway of the Skakel residence. A small group left the Skakel residence before 9:30 p.m. and drove twenty minutes away to the home of petitioner's cousin, James Dowdle, to watch a television program that aired at 10:00 p.m. Pet. App. 3a-4a. It is undisputed that Moxley and Tom Skakel remained outside the Skakel residence. *Id.* The State put on testimony that petitioner also stayed behind. Pet. App. 4a n.6. But several oth-

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[1] The defense presented evidence that members of the Skakel family habitually left golf clubs from the set to which the murder weapon belonged outside on their property, thus countering the inference that the murderer was someone with access to the Skakel house. Pet. App. 167a-168a.

ers recalled that petitioner left with the group for Dowdle's house, thus placing petitioner far from the scene when the crime was most likely committed.[2] *Id.* Although this account had been provided to the police in the fall of 1975, Pet. App. 206a-208a, 221a-223a, its force was weakened considerably by the inability of some of these witnesses to recall petitioner's whereabouts with certainty 25 years after the fact. *See* Pet. App. 169a-171a, 220a-221a, 223a-226a. The State took further advantage of the effects of its delay by arguing in its summation that petitioner's alibi had been fabricated by his family. Pet. App. 228a-234a.[3]

Petitioner also presented evidence pointing to Kenneth Littleton, who had just taken up residence with petitioner's family, as the assailant. Petitioner's ability to establish this defense was seriously compromised, however, when during the lengthy delay between the murder and trial the police misplaced a police sketch of an adult man seen by a security guard near the crime scene at the approximate time of the murder. *See* Pet. App. 62a-78a (discussing the State's failure to produce the drawing until after trial).

c. The remainder of the prosecution's case rested principally on witnesses who claimed petitioner had incriminated himself in the years following the crime. The most notable of these witnesses was Gregory Coleman, who had testified for the State at a pre-trial hearing but could not be cross-

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[2] The evidence pointed to 10:00 p.m. as the approximate time of the murder. For example, at least three witnesses heard a commotion or disturbance from the general vicinity of the murder scene at, or shortly before, 10 p.m. Pet. App. 6a n.7; *see, e.g.*, Pet. App. 168a-169a, 171a-172a (testimony by neighbor Helen Ix that her dog barked "violently" for twenty to thirty minutes at approximately 10 p.m. while standing in the middle of the road facing the area where Moxley's body was found).

[3] The Connecticut Supreme Court concluded that it was "reasonable" to posit such an effort by petitioner's family although the state's attorney "did not, and could not, point to any direct evidence of" it. Pet. App. 128a.

examined at trial because he died from a drug overdose between the pre-trial hearing and trial. The jury instead heard only a reading of Coleman's prior testimony, which Coleman had given while undergoing a heroin withdrawal so severe that he needed to go to the hospital after testifying. Pet. App. 192a-196a. Coleman had been an "enforcer" at the school for troubled youth that petitioner attended from 1978 to 1980. Coleman claimed that petitioner confessed his guilt while also boasting that he would escape the consequences because of his family connections. Pet. App. 183a. Coleman's account of petitioner's alleged confessions changed in subsequent retellings, *see, e.g.*, Pet. App. 184a-191a, 199a-203a; none of the individuals he identified as fellow witnesses to the confessions testified to corroborate his account; and the only witness who did provide testimony about the events recounted by Coleman contradicted Coleman's recollection. *Compare* Pet. App. 183a-184a, 196a-197a *with id.* at 182a-183a.

While the prosecution produced other witnesses who claimed to have heard petitioner admit involvement in the murder, these witnesses also had come forward with their accounts for the first time some twenty years after the crime, when it re-emerged as a prominent news story. Pet. App. 175a-182a. At the same time, key witnesses for the defense, including petitioner's father as well as the headmaster of the school where petitioner allegedly confessed to the murder, had lost most of their memory or had died in the almost 27 years between the date of the murder and the start of petitioner's trial.[4]

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[4] *See* Pet. App. 97a-101a (upholding trial court's admission of triple hearsay—in the form of prior grand jury testimony by Mildred Ix that petitioner's father had told her that petitioner admitted he may have committed the crime—after holding that both Ix's and petitioner's father's lack of recall of the statement made the admission of hearsay necessary); Pet. App. 172a-175a (testimony showing petitioner's father's inability to recall his children's names, the events of September 11, 2001, or the statement introduced through hearsay).

d. The State's substantial delay in arresting petitioner rendered him ineligible for adjudication as a juvenile, a disposition that would have substantially reduced his maximum sentence. At the time of the offense—and for nearly 20 years thereafter—Connecticut law prevented the transfer of a case such as his to adult court unless an investigation revealed, among other things, that there was no available state institution suitable for his placement. Pet. App. 23a-24a. In 1994, the agency responsible for detention and treatment of juveniles adopted a regulation prohibiting placement as a juvenile delinquent of anyone over the age of 18, thus "foreclos[ing] [petitioner's] adjudication in juvenile court." Pet. App. 24a.

The jury convicted petitioner. In August 2002 he was committed to state custody to serve a prison term of 20 years to life. Pet. App. 2a & n.2.

3. On appeal, petitioner argued *inter alia* that his prosecution violated Section 54-193's five-year limitations period for felony offenses. The State responded with a lengthy defense of the trial court's interpretation of that law—*i.e.*, the trial court's view that *Paradise* had been "unnecessary" because there had never been a limitation period for non-capital murder. In the final three paragraphs of its argument, the State included—as an alternative basis to affirm—a reprise of its unsuccessful request in *Crowell* that *Paradise* be overruled. Indeed, the State advanced no argument that would question the rules of statutory construction underlying *Paradise* and *Crowell*. Instead, it merely asserted that a defendant lacks a "vested right" in the limitations period in effect at the time of the offense, Pet. App. 258a—an assertion already *twice* dismissed by the Connecticut Supreme Court as beside the point. *See Crowell*, 636 A.2d at 806 ("We note, first, that this same 'vested right' argument was made by the state in *Paradise* and rejected by this court.")

The Connecticut Supreme Court affirmed. Notably, it did *not* uphold the trial court's interpretation of the limitations period in effect in 1975. Instead, "assum[ing], without deciding, that the five year limitation period of the pre-1976

amendment version of § 54-193 applies to murder," Pet. App. 33a n.31, the court announced for the first time that it was "persuaded" it had "wrongly decided" *Paradise* and that it now was "convinced" it is "far more likely that the legislature intended" for the 1976 amendment to apply to offenses "for which the preamendment limitation period has not expired." Pet. App. 32a.

The court decided to overrule *Paradise*, because—in its view—when the issue is whether the legislature intended that a new limitations period apply to "offenses for which the applicable preamendment statute of limitations period has not yet expired," the courts should not presume that the legislature intended prospective application only. In particular, the court deemed "illogical" its earlier unanimous decisions to characterize limitations statutes as "penal for purposes of determining the proper approach to their construction" because "such statutes inure to the *benefit* of criminal defendants." Pet. App. 42a. (emphasis in original) Recognizing that statutes of limitation are "designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past," Pet. App. 43a (quoting *Toussie v. United States*, 397 U.S. 112, 114-15 (1970)), the court nonetheless perceived a conflict between strict construction of statutes of limitations and what it characterized as the "remedial nature of criminal statutes of limitation," which dictates that "they 'are to be liberally interpreted in favor of repose.'" Pet. App. 43a-44a (quoting *Toussie*).

The court also cited the Constitution's prohibition of *ex post facto* laws as a further basis for reversing Connecticut's longstanding presumption against retroactive application of a new criminal limitations period. That is, the court found it significant, in deciding what the legislature is presumed to *intend*, that it believed the Constitution *permits* a legislature to extend a limitations period for offenses not yet barred by the passage of time. Pet. App. 48a-49a. Having therefore abandoned the longstanding distinction under Connecticut

law between civil and criminal limitations periods, Pet. App. 50a, the court announced that it would now switch the presumption and assume that the legislature intends for criminal limitations periods to apply retroactively to offenses for which the preexisting limitations period had yet to expire. Pet. App. 49a. Because the language of the statute "sheds no light on whether the legislature intended" for it to have retroactive effect, and with "scant" legislative history on that score, the new presumption led the court to rule that the 1976 Act applied to petitioner's case. Pet. App. 55a.

4. Petitioner timely moved for reconsideration and reargument claiming, as relevant here, that application to him of the new unexpected interpretation of the 1976 law violated his rights under the Due Process and Ex Post Facto Clauses of the Constitution. The State opposed the motion arguing, in part, that the Due Process Clause's requirements of notice, foreseeability and fair warning come into play when the states "*attach[es] criminal penalties to what previously had been innocent conduct.*" Pet. App. 292a (emphasis in State's brief; quoting *Rogers v. Tennessee*, 532 U.S. 451, 459 (2001)). The State contended that petitioner "cannot rely on" the *Paradise* decision, "coming eight years after he committed this murder, as having somehow misled him as to the criminality of his conduct." *Id.* The Connecticut Supreme Court denied the motion without opinion.

REASONS FOR GRANTING THE WRIT

The Due Process Clause's requirement that no State shall "deprive any person of life, liberty, or property, without due process of law," imposes on state courts many of the same restrictions that the Ex Post Facto Clause imposes on state legislatures. These two clauses ensure fundamental fairness, through notice and fair warning, and prevent arbitrary and vindictive use of the law. This Court has therefore held, with respect to the elements of a criminal offense, that a judicial construction of a statute may not be given retroactive effect if that construction is "'unexpected and indefensible by reference to the law which had been expressed prior to the

conduct in issue[.]'" *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964) (citation omitted).

These same principles prevent the retroactive expansion of a limitations period by the judiciary after the previous limitations period has expired. As this Court held in *Stogner v. California*, 539 U.S. 607 (2003), a state legislature may not authorize criminal prosecutions that the passage of time had previously barred, because such a law "produce[s] the kind of retroactivity that the Constitution forbids[.]" *Id.* at 610. The retroactive application of such a law threatens "'manifestly *unjust and oppressive*'" effects, *id.* at 611, because it "'unfair[ly]'" and "'dishonest[ly]'" allows prosecution after the State has "assured 'a man that he has become safe from its pursuit,'" thus "depriv[ing] the defendant of the 'fair warning,' that might have led him to preserve exculpatory evidence." *Id.* (citation omitted). The Due Process Clause forbids a State from accomplishing the same unfairness through its judicial branch.

The Connecticut Supreme Court violated petitioner's due process rights. It held for the first time, 25 years after the limitations period applicable to the Moxley murder had expired, that a statute abolishing limitations periods for non-capital murder and other offenses could now be applied to petitioner. The court reached this result by overruling two of its own unanimous decisions, each of which had conclusively held that the newer limitations statute did *not* apply to offenses committed before April 1976. *See Paradise*, 456 A.2d 305; *Crowell*, 636 A.2d 804.

The Connecticut Supreme Court's new interpretation of the statute, based on nothing more than a reassessment of arguments it had twice recently rejected, was "unexpected and indefensible" by reference to the court's recently-announced dispositive rulings. Applying the new interpretation to petitioner is manifestly unjust and oppressive, and it unfairly and dishonestly allows prosecution after petitioner has been assured (and reassured) that he was safe from pursuit. As in

Stogner, the State's failure to play by its own rules violates the Constitution.

The Connecticut Supreme Court has therefore decided an important federal question in a way that conflicts with the relevant decisions of this Court. The Connecticut Supreme Court's decision also conflicts with decisions of the federal courts of appeals and at least one other state court of last resort on the issue whether a reversal of a recent dispositive and binding opinion on the same subject was unexpected and indefensible. If the Connecticut decision is accepted as a correct result under the Due Process Clause, no citizen will be allowed to claim a lack of fair warning when a court reverses its prior interpretation of a criminal statute, no matter how firm the prior interpretation. The petition should be granted to remedy these conflicts in decisions on this important federal question.

THE CONNECTICUT SUPREME COURT'S REVERSAL OF BINDING CASE LAW TO REVIVE A TIME-BARRED PROSECUTION VIOLATES DUE PROCESS AND CONFLICTS WITH DECISIONS OF THIS AND OTHER COURTS.

A. The Due Process Clause Forbids Retroactive Expansion Of A Limitations Period To Permit A Prosecution That The Passage Of Time Had Previously Barred.

1. The Due Process Clause of the Fourteenth Amendment, like the Ex Post Facto Clause of Article I, guarantees fundamental fairness and prevents the arbitrary and vindictive use of the laws. In particular, the Due Process Clause prevents courts from expanding criminal statutes retroactively, just as the Ex Post Facto Clause proscribes the enactment of laws that seek to accomplish the same end.[5] As this

[5] Article I contains two Ex Post Facto Clauses, which apply the same prohibitions, one at the federal level and the other at the state level. Section 9 of Article I, which governs Congress, states that

Court recognized more than 200 years ago in *Calder v. Bull*, 3 U.S. (Dall.) 386, 390-91 (1798), the Ex Post Facto Clause prohibits the following four categories of legislative actions:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

See also Collins v. Youngblood, 497 U.S. 37, 46 (1990) (recognizing the authoritativeness of the *Calder* description of ex post facto laws). These four categories of laws are "manifestly unjust and oppressive." *Calder*, 3 U.S. at 391.

This Court has routinely found that the retroactive application of statutes in a manner described above violates the Constitution's prohibition on ex post facto laws. *See, e.g., Carmell v. Texas*, 529 U.S. 513 (2000) (holding that the retroactive application of an amendment to the criminal procedure code reducing the amount of corroborating evidence required for conviction of a sexual offense violated the Ex Post Facto Clause). That prohibition against ex post facto laws also extends to statutes, enacted after a limitations period has expired, "authoriz[ing] criminal prosecutions that the passage of time had previously barred." *Stogner*, 539 U.S. at 610. Thus, in *Stogner* this Court held that a law permitting the prosecution of sex-related child abuse offenses within one year of the victim's report to police may not be applied to

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[Footnote continued from previous page]

"No . . . ex post facto Law shall be passed." Section 10 of Article I states that "No State shall . . . pass . . . any ex post facto Law[.]"

offenses whose prosecution was time-barred at the time of the law's enactment. That use of such a law would "produce the kind of retroactivity that the Constitution forbids[.]" *Id.*

This Court recognized in *Bouie* that the Due Process Clause of the Fourteenth Amendment prohibits *courts* from achieving through judicial decision-making many of the same retroactive changes in criminal law that would be forbidden under the Ex Post Facto Clause if attempted by the legislative branch. 378 U.S. at 353-54 ("If a state legislature is barred by the *Ex Post Facto* Clause from passing . . . a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.") As this Court has recognized in the context of judicial decisions that "attach[] criminal penalties to what previously had been innocent conduct[,]" the guiding principles for determining whether the Due Process Clause forbids judicial expansion of a criminal statute are "notice, foreseeability, and, in particular, the right to fair warning[.]" *Rogers*, 532 U.S. at 459; *see also Marks v. United States*, 430 U.S. 188, 191-92 (1977).

A new limitations period, when applied retroactively to permit a prosecution that the passage of time had previously barred, violates the requirements of notice, foreseeability and fair warning protected by the Due Process Clause. In particular, a State that applies its laws in such a manner "has deprived the defendant of the 'fair warning,' *Weaver v. Graham*, 450 U.S. 24, 28 (1981), that might have led him to preserve exculpatory evidence." *Stogner*, 539 U.S. at 611. It "'unfair[ly] and dishonest[ly]'" permits prosecution "after the State has assured 'a man that he has become safe from its pursuit[.]'" *Id.* (quoting Judge Learned Hand in *Falter v. United States*, 23 F.2d 420, 426 (2d Cir. 1928)). In fact, such a statute "falls literally within the categorical descriptions of *ex post facto* laws set forth" in *Calder* because it "enable[s] punishment where it was not otherwise available 'in the ordinary course of law,'" 539 U.S. at 611, 614, and it "permit[s] conviction on a quantum of evidence where that quantum, at

the time the new law is enacted, would have been legally insufficient." 539 U.S. at 616.[6]

Of course, not every judicial ruling that reevaluates and refines the scope of criminal law is unconstitutional. Rather, the test for determining if the retroactive application of such a judicial decision violates the Due Process Clause is whether it construes the law in a manner that is "'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue[.]'" *Bouie*, 378 U.S. at 354. This formulation provides courts with the needed flexibility to ensure that the law may evolve, *see Rogers*, 532 U.S. at 462, while at the same time ensuring fundamental fairness, including the requirement that the prosecution and punishment of particular conduct be foreseeable. *See Rogers*, 532 U.S. at 461–62; *Marks*, 430 U.S. at 191–92; *Bouie*, 378 U.S. at 354. A judicial ruling that is unexpected and indefensible by reference to the status quo ante deprives a defendant of those protections. *Bouie*, 378 U.S. at 354.

As applied to statutes of limitations, the Due Process Clause prohibits the same sort of "unexpected and indefensible" judicial rulings described in *Bouie* if such rulings would authorize prosecution that the passage of time had previously barred. As noted above, this Court made clear in *Stogner* that such a result threatens the same "'manifestly *unjust and oppressive*'" effects that result from the retroactive application of other new criminal laws, and it "'unfair[ly]'" and "'dishonest[ly]'" allows prosecution after the State has "as-

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[6] The outcome in *Stogner* did not depend on the petitioner's ability to prove he had actually relied on the pre-existing limitations period or that he otherwise had been prejudiced by the prosecution's delay. The Court instead noted generally that "[m]emories fade, and witnesses can die or disappear" when there is a lengthy delay. 539 U.S. at 631. Although proof of prejudice to petitioner is therefore unnecessary, the retroactive extension of the limitations period in fact worked manifest prejudice against him. The prejudice included faded witness memories, the death and other unavailability of key witnesses, and petitioner's loss of the ability to be adjudicated as a juvenile rather than an adult.

sured 'a man that he has become safe from its pursuit[.]'" *Stogner*, 539 U.S. at 611. A judicial decision that is unexpected and indefensible by reference to the law which had been expressed after the previous limitations period had expired, and that authorizes criminal prosecution that previously had been barred, therefore falls squarely within the prohibitions of the Due Process Clause.

2. The Connecticut Supreme Court's decision overruling its earlier interpretation of the 1976 limitations statute—and then applying the new expansive interpretation for the first time in petitioner's case—is contrary to this Court's rulings in *Bouie*, *Marks* and *Rogers*. The Connecticut court, in holding that the 1976 repeal of certain limitations periods could apply in petitioner's case, overruled two of its own cases that were directly on point. Those cases—both decided after the expiration of the five-year limitations period for non-capital murder and several years before petitioner's arrest—squarely held that the 1976 statute does *not* apply to offenses committed before 1976. To reach the contrary result in petitioner's case, the state court simply changed its interpretation of the 1976 statute, accepting arguments that on each previous occasion it had considered and unanimously rejected. Such a construction of a criminal statute is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue," *see Bouie*, 378 U.S. at 354, and giving that new construction retroactive effect violates due process.

a. The legal issue controlling petitioner's motion to dismiss—that is, whether Connecticut's 1976 amendment to its limitations statute may be applied to his case—was squarely decided, not once but twice, before the State charged him with Martha Moxley's murder. Those two unanimous decisions left no doubt that the limitations period for a non-capital murder that occurred in 1975 was five years.

The *Paradise* case squarely held that persons charged with a non-capital murder that predated the 1976 amendment to Section 54-193 must be charged within five years of the

offense. That outcome was based on two legal rulings, each of which squarely applies to petitioner's case and—had the court adhered to them—would bar his prosecution.

First, the court held in *Paradise* that the criminal limitations statute in effect at the time of the offense that the State charged here "provided for a five-year period of limitations on all felony offenses." 456 A.2d at 306-07 (citing Conn. Gen. Stat. § 54-193).[7] That limitations statute was also in effect at the time of Moxley's murder, and the underlying offense—non-capital murder charged under Conn. Gen. Stat. § 53a-54a—was also the same.

Second, *Paradise* held that the 1976 amendment to the limitations statute—the amendment that for the first time abolished the limitations period for Class A felonies such as non-capital murder—is not "to be applied retroactively" to offenses that pre-dated the amendment. 456 A.2d at 306 & 309. The court, drawing a clear distinction between "the legislature's power to enact retrospective legislation" and the question whether *this* statute was retroactive "by its terms," 456 A.2d at 306, flatly and unanimously rejected the State's argument that the "procedural" nature of the statute of limitations and "considerations of good sense and justice mandate its retrospective application," *id.* at 307. Applying a presumption against retrospective application of criminal stat-

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[7] The court stated that it was not deciding "whether this statute, which does not specifically cover *capital* offenses, bars prosecution of a person for a crime for which the punishment is or may be death." 456 A.2d at 306 n.1 (emphasis added). In fact, the State later successfully proceeded against the two *Paradise* defendants on capital murder charges. *State v. Ellis*, 497 A.2d 974 (Conn. 1985). Under Connecticut law, capital murder is murder involving one of six special circumstances, such as killing a law enforcement officer, acting for pecuniary gain or killing while under a sentence of life imprisonment. Conn. Gen. Stat. § 54a-54b (Rev. to 1975). The question reserved in *Paradise* and answered in *Ellis* has no effect on the limitations period applicable to petitioner. "There is no dispute that the murder of the victim in the present case did not give rise to a charge of capital murder." Pet. App. 33a n.32.

utes, and finding "nothing in General Statutes § 54-193 which indicates a clear legislative intent that the statute have a retrospective effect," the court held that the charges were time-barred. *Id.* at 309.

The ruling in *Paradise* left no doubt that the prosecution of a non-capital murder committed in Connecticut in 1975 must be commenced in or before 1980. And assuming any doubt remained, the Connecticut Supreme Court removed it with its decision nine years later in *State v. Crowell*, 636 A.2d at 804. In *Crowell*, the State again sought retrospective application of a criminal limitations statute—this time an act that extended the five-year limitations period to seven years for child sex offenses. As was the case in *Paradise*, the pre-existing limitations period had expired before the defendant was charged. "These facts," the *Crowell* court observed, "make clear that in *Paradise*, we considered the identical issue raised in this appeal, that is, whether a new statute of limitations may be applied to an offense committed prior to its effective date, where the new statute takes effect before the original statute of limitations expires." 636 A.2d at 806. The State acknowledged that *Paradise* was controlling but argued it should be overruled because it was based on a "faulty premise." *Id.* In particular, the State contended that "the *Paradise* court's 'reliance on rules of statutory construction pertaining to retroactivity is misplaced and should be reconsidered.'" *Id.*

The court in *Crowell* considered, and once again rejected, the State's position. It noted that in *Paradise* it had already explicitly rejected the same arguments the state advanced in favor of retroactive application of the limitations period. 636 A.2d at 806. The *Crowell* court went on to explain that it nonetheless conducted "a thorough consideration of the parties' arguments in *State v. Paradise*, supra, and the reasoning behind that decision" and "conclude[d] that it should not be overruled." *Id.* at 807.

The *Crowell* decision, coming nearly 20 years after the offense with which petitioner was later charged, therefore

reaffirmed the Connecticut Supreme Court's ruling in *Paradise* that the 1976 law abolishing the limitations period for non-capital murder did not apply to offenses that occurred before April 6, 1976. The *Paradise* case, in turn, was indistinguishable from petitioner's. It involved a prosecution for non-capital murder based on conduct that pre-dated the 1976 amendment's expansion of the limitations period beyond five years. And the unanimous ruling unequivocally established that such a prosecution could not be commenced more than five years after the offense occurred—1980 in this case.

b. The Connecticut Supreme Court's decision to revive petitioner's time-barred prosecution conflicts with this Court's rulings in *Bouie*, *Marks* and *Rogers*. In each of those cases the Court held that the Due Process Clause forbids giving retroactive effect to a new and more expansive construction of a criminal statute if that construction is unexpected and indefensible by reference to the law that had been previously expressed. As the Court's explanation of that test in each of those three cases makes clear, the Connecticut Supreme Court decision cannot be squared with those rulings.

In *Bouie*, this Court held that the South Carolina Supreme Court's expansive construction of a trespass statute could not be applied to conduct pre-dating that broad interpretation. The statute forbade "'entry upon the lands of another * * * after notice from the owner or tenant prohibiting such entry[.]'" 378 U.S. at 349-50. The state supreme court applied that statutory prohibition to two defendants who merely remained on the premises after being asked to leave. This Court reasoned that "[t]here was nothing in the statute [prior to the South Carolina Supreme Court's post-conduct interpretation] to indicate that it also prohibited the different act of remaining on the premises after being asked to leave." *Id.* at 355. Not only was this interpretation "at variance with the statutory language," it did not find "the slightest support in prior South Carolina decisions." *Id.* at 356 ("In sum, in the 95 years between the enactment of the statute in 1866 and the 1961 decision . . . the South Carolina cases construing the statute . . . gave not the slightest indication that that require-

ment could be satisfied by proof of the different act of remaining on the land after being told to leave.") *Id.* at 356-57. Thus, the petitioners in *Bouie*, "had no fair warning of the criminal prohibition under which they now stand convicted," and therefore the application of the court's new interpretation to the petitioners violated due process. *Id.* at 361.

The Connecticut Supreme Court's decision to overrule precedent and apply a new interpretation of the 1976 limitations statute to petitioner is contrary to the reasoning and the holding in *Bouie*. In fact, the court's determination in petitioner's case that the limitations period for class A felonies occurring in 1975 had been abolished in 1976 was even more "unexpected and indefensible" than the South Carolina Supreme Court's interpretation of its trespass statute. In *Bouie*, this Court found the new interpretation of the statute to be "unexpected and indefensible" where prior cases interpreting the statute had *never addressed* whether prosecution could be predicated on the refusal to obey a request to leave. Here, however, the Connecticut Supreme Court had already affirmatively addressed the very question at issue—whether the 1976 statute was meant to apply to pre-enactment offenses—and explicitly held that the statute did *not* authorize prosecution of the category of offenses with which petitioner was later charged. *Paradise*, 456 A.2d 305. And the court reaffirmed that 1983 holding in 1994, after explicitly rejecting the state's argument that the case had been wrongly decided. *Crowell*, 636 A.2d 804. Thus, for at least 11 of the 19 years between the expiration of the five-year limitations period and petitioner's arrest, he had the strongest possible assurance that the 1976 limitations statute could not apply to him.[8]

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[8] It is sufficient, for purposes of making out a due process violation, that the state's "assur[ance]" that petitioner was "'safe from its pursuit,'" *Stogner*, 539 U.S. at 611, took the form of unanimous rulings spanning a period of 11 years. Nonetheless, between 1994 (when *Crowell* was decided) and 2000 (when petitioner was charged), the Connecticut Supreme Court did not so much as hint the contrary—*i.e.*, that *Paradise* and *Crowell* were wrongly decided. Indeed, it gave no such indication until nearly four years

Those rulings on the scope of the 1976 statute were at least as "definite and precise" as the trespass statute in *Bouie*. In overruling those two cases, the Connecticut Supreme Court gave the 1976 statute an interpretation that was "unexpected and indefensible by reference to the law" which that very court had "expressed" after the then-applicable limitations period had expired. Under *Bouie*, the court violated petitioner's due process rights.

The Connecticut Supreme Court's ruling also conflicts with this Court's decision in *Marks*, a case rejecting on due process grounds the retroactive application of a broader definition of obscenity where the broadening resulted from the Court's decision to overrule one of its prior cases. The Court had previously articulated in a plurality opinion a three-part test for obscenity. *See Memoirs v. Massachusetts*, 383 U.S. 413 (1966). Seven years later, in *Miller v. California*, 413 U.S. 15 (1973), the Court modified, among other things, the third part of the *Memoirs* test. That third part, which had protected expressive material unless "'utterly without redeeming social value[,]'" was altered to focus the inquiry on "'whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.'" *See Marks*, 430 U.S. at 190-91. The petitioners in *Marks*, whose conduct predated the *Miller* decision, argued they were entitled to jury instructions under the more favorable *Memoirs* formulation of part three. This Court agreed, because *Miller* "marked a significant departure from Memoirs[,]" 430 U.S. at 194, and petitioners therefore "had no fair warning that their products might be subjected to the new standards." 430 U.S. at 195.

The Connecticut Supreme Court's alteration of the law to uphold petitioner's conviction contains the same features that required reversal in *Marks*. The Connecticut Supreme Court's opinion "did not simply clarify" the *Paradise* and *Crowell* decisions; it "marked a significant departure from"

[Footnote continued from previous page]

after petitioner was convicted, when it unexpectedly overruled those decisions in affirming petitioner's own conviction.

those prior rulings. *See Marks*, 430 U.S. at 194. Indeed, a more significant departure could not be imagined. And the *Marks* Court reversed even though "the Memoirs standards never commanded the assent of more than three Justices at any one time," 430 U.S. at 192, and even though persons tried after the *Miller* decision were entitled to the application of "'any constitutional principle enunciated in *Miller* which would serve to benefit'" them. 430 U.S. at 197 (quoting *Hamling v. United States*, 418 U.S. 87, 102 (1974)). The case for reversing petitioner's conviction is even stronger where, unlike in *Marks*, there was no sign that the prior decisions were vulnerable to change and where nothing in the new interpretation of the 1976 statute was even arguably favorable to petitioner. Here, no less than in *Marks*, the highest court's reversal of—and marked departure from—its own recent case law deprived petitioner of fair notice that the prosecutor could bring a case that previously was disallowed.

The Connecticut Supreme Court's retroactive application of its interpretation of the 1976 statute to petitioner is also inconsistent with this Court's opinion in *Rogers*. In *Rogers*, this Court held that the judicial abrogation of Tennessee's common law year-and-a-day rule for murder cases was not unexpected or indefensible by reference to the law that previously had been expressed, and thus could be applied retroactively without offending the Due Process Clause. 532 U.S. 451. But the Court noted that the year-and-a-day rule, permitting murder charges only if the victim died within a year and a day of the defendant's injurious conduct, was rooted in the incapability of 13th century medical science to establish causation beyond a reasonable doubt when a great deal of time had elapsed between the victim's injury and his death. *Id.* at 463. Practically every court to have considered the rule before the petitioner committed his offense had noted that advances in medical science rendered the rule obsolete. *Id.* The first and only mention of the rule by the Tennessee Supreme Court was in 1907, reversing the conviction of the defendant and noting the rule only in passing. *Id.* at 464–65. Moreover, "at the time of petitioner's crime," the year-and-a-

day rule had "only the most tenuous foothold as part of the criminal law of the State of Tennessee . . . [T]he rule had never once served as a ground of decision in any prosecution for murder in the State." *Id.* at 464. Thus, this Court held that "[f]ar from a marked and unpredictable departure from prior precedent, the court's decision was a routine exercise of common law decisionmaking in which the court brought the law into conformity with reason and common sense." *Id.* at 467.

The Connecticut Supreme Court's decision, on the other hand, was anything but "a routine exercise of common law decisionmaking" that "brought the law into conformity with reason and common sense." Not only was the court interpreting a statute, rather than promoting the evolution of judge-made common law, the court's *Paradise* and *Crowell* decisions were recent rulings based on well-established principles of state law. *See, e.g., Paradise*, 456 A.2d at 308 (noting that for criminal cases, "the law in Connecticut has long been to the contrary" of the rule in the civil field that procedural statutes are presumed to operate retrospectively). Those decisions were not questioned by the court until 2006, when the court for the first time credited the State's argument, rejected twice before in *Paradise* and *Crowell*, that the 1976 statute should apply retroactively. Thus, the court's decision that "*Paradise* was wrongly decided," Pet. App. 32a, is the "marked and unpredictable departure" from a court's prior precedent to which *Rogers* refers. *See* 532 U.S. at 467. The retroactive application of such a departure to petitioner therefore offends the constitutional guarantees of due process articulated by this Court in *Rogers* too.

c. The breadth of the Connecticut Supreme Court's approach to retroactivity is of enormous significance. If that approach is permitted, no citizen may rely on a state supreme court's interpretation of its own criminal statutes, no matter how precisely on-point or longstanding or well-settled the prior interpretation. Such an interpretation could be reversed and applied retroactively to a defendant's detriment on the pretext that every citizen is on fair notice that *stare decisis* is

not an absolute principle. The right to fair warning in this context would be rendered a nullity by the fact that every judicial decision has the potential of one day being overruled. Such a proposition is so far-reaching that this Court's review is warranted.

B. The Connecticut Supreme Court's Application of Its New Statutory Interpretation to Petitioner Conflicts With The Decisions Of Federal Courts of Appeals And Another State Supreme Court.

The Connecticut Supreme Court decision also conflicts with rulings from the federal courts of appeals and the highest court of another state, all of which have held that the reversal of recent and binding precedent interpreting a state statute or other provision of law violates the Due Process Clause. These courts have expressly ruled that such new interpretations are "'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue[.]'" *Bouie*, 378 U.S. at 354. This conflict independently warrants the Court's review.

First, the Connecticut Supreme Court decision conflicts with the Eighth Circuit's holding in *Moore v. Wyrick*, 766 F.2d 1253, 1258-59 (8th Cir. 1985). There, the court held that a new Missouri Supreme Court construction of that State's felony murder statute may not be applied retroactively because: (1) until that new decision an earlier controlling opinion reached a different result on indistinguishable facts; (2) no intervening case challenged or weakened the earlier opinion's authority; and (3) the new decision significantly expanded the scope of the statute.

The issue in *Moore* was whether the defendant, who participated in an armed robbery, could be charged under the felony murder statute where a bystander was killed, not by a shot that defendant or an accomplice fired, but by one fired by one of the intended victims of the robbery. 766 F.2d at 1254. The Eighth Circuit conceded that the plain language of Missouri's felony murder statute—without more—might have provided fair notice to the defendant that he could be

charged under such circumstances. *Id.* at 1257. But the Missouri Supreme Court had previously concluded, in *State v. Majors*, 237 S.W. 486 (Mo. 1922), that the statute was limited to cases where the killing was committed by the defendant or an accomplice. "As such," the Eighth Circuit held, "whether or not the plain language of the statute would, absent prior judicial construction, give Moore fair warning that his conduct might constitute felony murder is irrelevant. Instead, we must determine whether the expanded scope of the Missouri felony murder statute was foreseeable in light of its previously narrow construction." 766 F.2d at 1257-58. The Eighth Circuit concluded that the expanded construction of the statute was not foreseeable, because "the issue presented in *Majors* and, more importantly, the court's decision in *Majors* were never reexamined or questioned by the Missouri courts." 766 F.2d at 1258 (concluding that "the change in law judicially effected . . . was constitutionally unforeseeable and thus cannot be applied retroactively").

The Connecticut Supreme Court's decision was an equally unforeseeable expansion of a criminal statute, because: (1) *Paradise*, a case dealing with indistinguishable facts, was controlling; (2) no intervening case challenged or weakened its authority—indeed, its authority was confirmed by *Crowell*; and (3) the new decision significantly expanded the scope of the limitations period to authorize a prosecution that had previously been barred. The Connecticut Supreme Court's decision is in square conflict with the Eighth Circuit's decision in *Moore*.

Second, the decision below conflicts with the Ninth Circuit holding in *United States v. Potts*, 528 F.2d 883, 886 (9th Cir. 1975) (en banc), that the reversal of one of its own decisions, which had the effect of expanding the scope of a federal criminal statute, could not be applied retroactively. The *Potts* court overruled an earlier decision on the ground that it had been based on a misreading of state law, and thus held that an individual whose felony record had been expunged under Washington law was still a felon for the purposes of the felon-in-possession-of-firearms laws. *Id.* at 884-85 &

n.2. The court further held, however, that its new interpretation could not be applied retroactively to Potts because at the time he possessed a firearm he lacked notice of the broader interpretation of the statute. *Id.* at 886 ("While Hoctor stood as the law of this circuit, a person such as Potts, whose sole prior felony conviction had been expunged pursuant to the Washington statute, could not reasonably have suspected that his possession of a firearm, in or affecting commerce, would constitute a § 1202(a)(1) violation.") The Ninth Circuit's conclusion that "due process fairness bars the retroactive judgment of his conduct using the expanded definition," *id.* (internal quotation marks and citation omitted), is also in direct conflict with the Connecticut Supreme Court's retroactive application of a new and expanded interpretation of a criminal statute.

Finally, the California Supreme Court held in *People v. Martinez*, 20 Cal. 4th 225, 240-41 (1999), that its new test for the asportation element in simple kidnapping cases could not be applied retroactively because the previous line "was laid down" by two previous decisions of the state supreme court and the defendant "had no fair warning that it would be redrawn." 20 Cal. 4th at 241. Noting that the "mere possibility that this court might reconsider its own precedent is not the equivalent of actually overruling it," *id.* at 240 (internal quotation marks and citation omitted), the court refused to apply the new interpretation retroactively. The Connecticut Supreme Court's decisions in *Paradise* and *Crowell* did not even hint at a "possibility" that the court might reconsider its own precedent, twice rejecting the same arguments presented by the State in the case at hand. As such, the Connecticut Supreme Court's retroactive application of a new interpretation also conflicts with the California Supreme Court's decision in *Martinez*.

CONCLUSION

For more than 20 years following the expiration of the limitations period in effect at the time of the offense, the Connecticut Supreme Court gave petitioner the strongest assurance that a broader limitations statute did not apply. In abruptly overruling the cases that provided that assurance, and then applying the new interpretation retroactively to petitioner, the Connecticut Supreme Court contravened the precedent of this Court and created a conflict with the rulings of federal courts of appeals and another state supreme court. This Court should therefore grant the petition for a writ of certiorari.

Respectfully submitted.

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